Supreme Court, U.S.
FEB - 3 1994
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No. 93-1108
IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1993

NED McWHERTER, Governor of Tennessee, et al,
Appellants,

v.

RURAL WEST TENNESSEE AFRICAN AMERICAN AFFAIRS COUNCIL, INC., et al,
Appellees.

Appeal from the United States District Court
for the Western District of Tennessee

BRIEF OF AMICUS CURIAE STATE OF MICHIGAN IN SUPPORT OF JURISDICTIONAL STATEMENT

FRANK J. KELLEY
ATTORNEY GENERAL

THOMAS L. CASEY
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Deborah Anne Devine
Assistant Attorney General
Stephen J. Markman
Special Assistant Attorney General

Attorneys for Amicus Curiae
State of Michigan

QUESTIONS PRESENTED

I.

Whether in a vote-dilution challenge to a legislative districting plan under Section 2 of the Voting Rights Act, statewide percentages are the proper measure of proportionality even where the evidence of vote dilution focuses only on one limited region within the State.

II.

Whether a legislative districting plan may be held to violate Section 2 of the Voting Rights Act based on its failure to create an additional majority-minority district drawn solely on grounds of race and in disregard of traditional districting principles.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT

THE COURT SHOULD NOTE PROBABLE JURISDICTION IN McWHERTER, ET AL v RURAL WEST TENNESSEE AFRICAN AMERICAN AFFAIRS COUNCIL, INC, ET AL 6

CONCLUSION 22

TABLE OF AUTHORITIES

Pages

Cases

Baird v Consolidated City of Indianapolis, 976 F2d 357 (7th Cir, 1992), cert den 113 S Ct 2334 (1993) 15

Brown v Thompson, 462 US 835 (1982) 20

Davis v Bandemer, 478 US 109 (1986) 7

Hayes v Louisiana, No. 92-CV-1522 (WD La, Dec. 28, 1993) 21

Johnson v DeGrandy, No. 92-516, 61 USLW 8580 (prob. juris. noted Feb. 22, 1993) 22

Karcher v Daggett, 462 US 725 (1983) 20

League of United Latin American Citizens v Clemens, 986 F2d 728 (5th Cir, 1993) 18

McWherter, et al v Rural West Tennessee African American Affairs Council, Inc, et al, ___ F Supp ___ (WD Tenn, 1993) United States Supreme Court No. 93-1108 ..... passim

Nash v Blunt, 797 F Supp 1488 (WD Mo, 1992) aff'd, 113 S Ct 1809 (1993) 14,15

Pages

NAACP, et al v Austin, et al,
No. 92-CT-072696-DT (ED Mich) 1,4

Shaw v Reno, ___ US ___;
125 L Ed 2d 511 (1993) 13,20

Thornburg v Gingles,
478 US 30 (1986) 9,11-13,19

Constitutional Provisions

Fifteenth Amendment 1

Fourteenth Amendment 1

Statutes

42 USC § 1973 1

42 USC § 1973(b) 7

Miscellaneous

S. Rpt. No. 97-417,
97th Cong. 2nd Sess. at 28 8

STATEMENT OF INTEREST OF AMICUS CURIAE

In NAACP, et al v Austin, et al, No. 92-CT-72696-DT (ED, Mich), Amicus State of Michigan is currently defending a challenge to its 1992 legislative apportionment plan in which the plaintiffs allege that the Michigan Supreme Court violated Section 2 of the Voting Rights Act of 1965, as amended, 42 USC § 1973 and the Fourteenth and Fifteenth Amendments to the United States Constitution by failing to create the maximum number of majority-minority districts possible based on statewide black population figures. Essentially plaintiffs are seeking to "maximize" or "optimize" the number of majority-black districts that could be created in Wayne and Oakland Counties (and in Michigan) which the State maintains is not required by the Voting Rights Act.

Plaintiffs' Complaint alleges that the State of Michigan's legislative districting plan violates Section 2 "by establishing only 4 Senate districts and no more than 13 house districts ... with an electorally effective black majority" when "5 Senate Districts and 15 House districts could have been created". (Paragraph 16 of the Complaint) The State of Michigan has raised the defense of sustained proportional representation. Depending upon how proportional representation is calculated, the State's plan provides black voters in Wayne and Oakland Counties, the geographical area in dispute, with proportionality whether calculated based on voting age population (VAP) or population. If calculated on VAP statewide, mathematically proportional representation would be 14 dis-

tricts in the House and 4.8 in the Senate. Plaintiffs claim that the Voting Rights Act requires the creation of 5 Senate districts and 15 House districts based on their assertion that the Voting Rights Act requires calculating representation on statewide population basis. With the exception of a majority-black district created in Genesee County, there are no areas outside of Wayne and Oakland Counties in Michigan in which the population of blacks are sufficiently large and compact to enable the creation of a majority-black House or Senate District. To create additional districts would require the State of Michigan to disregard its constitutional redistricting criteria and make race the paramount criteria in drawing lines subject only to one person - one vote requirements of the

United States Constitution. The three-judge panel in NAACP v Austin has requested supplemental briefs from the parties analyzing the panel decision in the instant case and its possible application to the Michigan litigation.

This brief amicus curiae is submitted by the State of Michigan in order to urge this Court to note probable the instant case because it raises two substantial and unsettled questions of law which, if decided by this Court, will significantly impact upon the voting rights litigation scheduled for trial April 18, 1994 in NAACP, et al v Austin, et al, No. 92-CT-72696-DT (ED Mich) and cases pending in other states.

SUMMARY OF ARGUMENT

In a vote-dilution challenge under Section 2 of the Voting Rights Act to a legislative districting plan, a defense of sustained proportional representation may be established by use of statistics concerning voting age population within the geographic area in dispute. A valid defense of sustained proportional representation cannot be obviated by the use of statistics concerning population or voting age population on a statewide basis.

A legislative districting plan may not be held to violate Section 2 of the Voting Rights Act based on a failure to create additional majority-minority districts drawn solely on grounds of race and in disregard of traditional legiti-

mate districting principles such as compactness, respecting municipal boundaries, preserving the cores of prior districts and avoiding contests between incumbent office-holders.

ARGUMENT

THE COURT SHOULD NOTE PROBABLE JURISDICTION IN McWHERTER, ET AL v RURAL WEST TENNESSEE AFRICAN AMERICAN AFFAIRS COUNCIL, INC, ET AL

The State of Michigan, and other states, need clear guidance from this Court on both issues raised by Appellant in its Jurisdictional Statement.

The first question, whether in a vote-dilution challenge to a legislative districting plan under Section 2 of the Voting Rights Act, statewide percentages are the proper measure of proportionality even where the evidence of vote dilution

focuses only on one limited region within the State, ties directly into the issue of how to calculate proportional representation under the Voting Rights Act in order to prove a defense of sustained proportional representation. The Voting Rights Act expressly provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 USC § 1973(b).

As noted by the Appellants, the courts have uniformly rejected the suggestion that the Voting Rights Act or the Constitution require proportional representation for minority groups. See e.g., Davis v Bandemer, 478 US 109, 130 (1986). Since proportional representation is not

required by the Voting Rights Act or the Constitution, proof of sustained proportional representation is logically a complete defense to a Section 2 vote-dilution claim.

According to the Senate Report that accompanied the 1982 amendments to the Voting Rights Act, the "right" question to be asked in a Section 2 vote-dilution lawsuit is whether "as a result of the challenged practices or structure plaintiffs do not have equal opportunity to participate in the political process and to elect candidates of their choice.?" S. Rpt. No. 97-417, 97th Cong. 2nd Sess. at 28. This means that plaintiffs in a Section 2 lawsuit have the burden of showing, inter alia, that "a bloc voting majority must usually be able to defeat

candidates supported by a politically cohesive, geographically insular minority group." Thornburg v Gingles, 478 US 30, 49 (1986) (emphasis in the original). If a minority group has sustained proportional representation, it cannot be said as a matter of law that a bloc voting majority "usually" defeats its preferred candidate. Nor can it be said that the minority group has been denied "an equal opportunity to participate in the electoral process and elect candidates of their choice," because proof of sustained proportional representation is proof of at least equal opportunity.

Justice Brennan, in a portion of his opinion joined by Justice White, thus noted:

> The District Court did err, however, in ignoring the significance of the sustained success black voters have

> experienced in House District 23. In that district, the last six elections have resulted in proportional representation for black residents. This persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority.
>
> In some situations, it may be possible for § 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representative, but Appellees have not done so here. * * * Consequently, we believe that the District Court erred, as a matter of law, in ignoring the sustained black voter success in house District 23, and would reverse with respect to that District. 478 US at 77 (emphasis in the original, footnote omitted)

Although Justice Brennan suggested that there were "some situations" in which the existence of sustained proportional representation might not suffice to defeat a Section 2 claim, it is note-

worthy that he engaged in no such "totality of the circumstances" analysis in the case of District 23. Despite findings by the trial court of historical voting discrimination, in dismissing the Section 2 claim in regard to District 23, Justice Brennan relied on little else than the reality of proportional representation for blacks in that district. Gingles, 478 US at 38-39, 80.

Justice O'Connor, in a concurring opinion joined by three Justices stated: "I agree with Justice Brennan that consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation." 478 US at 102.

In all, six Justices concurred in the result dismissing the Section 2 claim regarding District 23.

The problem that has arisen since Gingles is the proper calculation to be used in determining proportional representation when the alleged Section 2 violation is the failure to create more majority-minority districts.

Arguments that statewide population figures should be used to determine the maximum number of districts possible for proportional representation calculation totally ignores the reality of where people live and vote. The use of statewide population, or statewide VAP as used by the district court in West Tennessee, results in including minorities scattered across the state who are not "sufficiently large and geographically compact to constitute a majority in a single member district." Gingles, 478 US at 50.

As stated by the Appellants, this method of calculation "reflects the principle of virtual representation." i.e. that representatives elected from majority-minority districts have the obligation, not merely to represent their own constituents, but also those individuals living elsewhere within the state who share the racial characteristics of those constituents. This notion of representative government finds no basis in the Voting Rights Act or in American history. See Shaw v Reno, ___ US ___; 125 L Ed 2d at 529-30, Gingles, 478 US at 50, fn 17.

While the district court in West Tennessee rejected the use of statewide population figures to calculate proportional representation, it still used statewide VAP figures to assess propor-

tionality notwithstanding the fact that the proofs were focused on the geographical areas in which blacks were sufficiently concentrated to enable the creation of an additional majority-minority district. As noted at page 12 of Appellants' Jurisdictional Statement, reversal of the district court's use of statewide VAP calculations would make a critical difference to the result in this case and to the State of Michigan's pending litigation where sustained proportional representation has been raised as a defense. As noted by Appellants at page 13 of their Jurisdictional Statement, the three-judge panel in Nash v Blunt, 797 F Supp 1488, at 1498-1499, 1506-1507 (WD Mo, 1992) aff'd, 113 S Ct 1809 (1993), held that proof of a "past trend" of proportional representation,

combined with evidence that the challenged plan is likely to continue that trend is an "affirmative" and "legal defense" to a "plaintiff's § 2 claim." In calculating proportionality the Nash court rejected the use of statewide calculations as used by the court in West Tennessee, and used the challenged geographical area to determine proportionality. See also Baird v Consolidated City of Indianapolis, 976 F2d 357, 360 (7th Cir, 1992), cert den, 113 S Ct 2334 (1993), which used the challenged geographical area to determine proportional representation.

Clearly, guidance from this Court on the proper measures to be used in calculating proportional representation is needed to both assist state apportionment

bodies in determining whether there are any potential Voting Rights Act problems with their plans and to avoid needless and expensive litigation.

The second question raised by Appellants, whether a legislative districting plan may be held to violate Section 2 of the Voting Rights Act based on its failure to create an additional majority-minority district drawn solely on grounds of race and in disregard of traditional districting principles, goes to the heart of the issue faced by apportioning bodies: what does the Voting Rights Act really require when drawing district lines? The proposition that the Voting Rights Act requires apportioning bodies to create the maximum number of black majority districts in total dis-

regard of legitimate State redistricting criteria makes race the paramount factor subject only to one person-one vote requirements of the United States Constitution. This is the result of the court's ruling in West Tennessee.

In West Tennessee, the court concluded that integrity of county boundaries was a factor "which clearly weighs in favor of the State" when looking at the totality of the circumstances. (Slip Opinion, p 12). However, the court found that there were some practical problems with weighing the state's interests under the totality of the circumstances test, stating:

> Because the state interests would not be a signal of dilution like other Section 2 factors (including the tenuousness of state interest), a court analyzing a Section 2 claim under the proposed balancing framework would no longer ask only

> whether, under the totality of the circumstances, there is unequal opportunity to participate in the political process. The court would also ask whether in light of the state interests, the unequal opportunity to participate is sufficient to support a finding of liability under Section 2. In other words, the state interests would have to be weighed against proven vote dilution. The problem with such a framework from a district court's perspective is the lack of standards to such an approach. (Slip Opinion, p 19, quoting from League of United Latin American Citizens v Clemens, 986 F2d 728, 763 (5th Cir, 1993), cites omitted.)

The court resolved this "lack of standards" by finding, slip opinion, p 19, "... that the state's interest in an electoral scheme are only relevant to the extent that those interests are compromised by a possible § 2 remedy. * * * When potential remedies do not impinge on the state's interests those interests need not be considered" and ignored the

state's legitimate interest in protecting county boundaries in its assessment of the totality of the circumstances analysis. Yet both plans submitted by the Plaintiffs to meet the first Gingles precondition of compactness required breaking county lines solely based upon the race of the voter in order to create more majority-minority districts. The result was to apply race as the controlling factor to the total disregard of the state's apportionment criteria. This ruling is inconsistent with the notion that a state has legitimate considerations in the redistricting process that go beyond the Voting Rights Act. These other considerations include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts and avoiding contests between

incumbent" office-holders. Karcher v Daggett, 462 US 725, 740 (1983).

Even constitutionally-grounded population equality has not been thought to trump each of these considerations in a way that the Voting Rights Act would under the West Tennessee ruling. See Brown v Thompson, 462 US 835, 842 (1982), where this Court held that "some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives." This Court has held that "district lines obviously drawn for purposes of separating voters by race requires careful scrutiny under the Equal Protection Clause of the Fourteenth Amendment regardless of the motivations underlying their adoption." Shaw, ___ US ___; 125 L Ed 2d 511, 527

(1993). See also Hayes v Louisiana, No. 92-CV-1522 (WD La, Dec. 28, 1993).

Direction from this Court in how to balance the States' legitimate interests in redistricting with the requirements of the Voting Rights Act is sorely needed to resolve current Voting Rights Act challenges and to avoid them after the next census in 2000.

CONCLUSION

This Court should note probable jurisdiction or, at a minimum, hold this appeal in abeyance and dispose of it as appropriate in light of its pending decision in Johnson v DeGrandy, No. 92-516, 61 USLW 8580 (prob. juris. noted Feb. 22, 1993).

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, MI 48909
(517) 373-1124

Deborah Anne Devine
Assistant Attorney General
Stephen J. Markman
Special Assistant Attorney General

Attorneys for Amicus Curiae
State of Michigan